8-13-2014

State v. Herrera Appellant's Brief Dckt. 41494

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. JOSEPH DUANE HERRERA, Defendant-Appellant.	)	NO. 41494 BENEWAH COUNTY NO. CR 2011-2053 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

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STATEMENT OF THE CASE

Nature of the Case

Joseph Duane Herrera appeals from his conviction for second degree murder, entered following a jury trial, for the shooting death of his girlfriend. On appeal, he asserts that the evidence of malice was insufficient to support a conviction for second degree murder because it was undisputed that Mr. Herrera believed the firearm to be unloaded at the time it discharged. He further asserts that the district court erred when, over his objection, it permitted the State to present irrelevant and prejudicial hearsay attributed to the victim, and when it denied his two motions for mistrial made after two of the State's final witnesses provided prejudicial testimony that had been excluded by the district court.

Statement of the Facts and Course of Proceedings

Mr. Herrera was charged, by Amended Prosecuting Attorney's Information, with murder in the second degree, alleged to have been committed as follows:

> [T]hat the said JOSEPH DUANE HERRERA on or about the 25th day of December, 2011, in the County of Benewah, State of Idaho, did unlawfully and with malice aforethought, but without premeditation, kill Stephanie Comack, a human being, by willfully and deliberately pointing a .380 handgun at her head and pulling the trigger, from which she died.

(R., pp.223-24.)

At trial, the State was permitted, over Mr. Herrera's objection, to present testimony and evidence concerning statements purportedly made by Ms. Comack about Mr. Herrera and their relationship in the weeks leading up to her death under Idaho Rule

TABLE OF AUTHORITIES

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of Evidence 803(3). (Motions Hearing Tr., p.153, Ls.14-23; Trial Tr. (Vol. I),[1] p.307, L.4 – p.308, L.25, p.309, L.6 – p.310, L.3.) Those statements included purported threats of suicide by Mr. Herrera, the description of an incident in which Mr. Herrera purportedly battered Ms. Comack and threatened her with a firearm, and Ms. Comack's description of Mr. Herrera as "psycho." (Trial Tr. (Vol. I), p.331, L.21 – p.332, L.1; Trial Tr. (Vol. II), p.16, L.15 – p.19, L.16, p.64, Ls.3-8, p.65, Ls.4-8, p.66, Ls.14-21.)

During the course of testimony from two of the witnesses who were permitted to offer hearsay statements attributed to Ms. Comack, each testified as to matters that the district court had explicitly ruled were inadmissible, specifically purported physical abuse and bruises suffered by Ms. Comack. (Trial Tr. (Vol. I), p.312, Ls.6-16; Trial Tr. (Vol. II), p.17, Ls.3-7.) After each instance, defense counsel moved, unsuccessfully, for a mistrial. (Trial Tr. (Vol. I), p.313, L.13 – p.315, L.5; Trial Tr. (Vol. II), p.54, L.7 – p.57, L.20.)

During the State's closing argument and rebuttal closing, the State acknowledged that Mr. Herrera did not believe the firearm was loaded at the time he pointed it at Ms. Comack and pulled the trigger. (*See generally*, Trial Tr. (Vol. III).) The final words in the State's rebuttal closing were, "He pulled that gun out, he put it to her head. *He thought he took the bullets out.* He pulled the trigger and the bullet came out. That's murder in the second degree." (Trial Tr. (Vol. III), p.97, Ls.15-19 (emphasis added).)

[1] The trial transcripts appear in three volumes. References to the transcript covering the first three days of trial and the sentencing hearing will be cited as "Trial Tr. (Vol. I)." References to the transcript covering the fourth day of trial will be cited as "Trial Tr. (Vol. II)." References to the transcript covering jury instructions and closing arguments will be cited as "Trial Tr. (Vol. III)."

Ultimately, Mr. Herrera was found guilty of second degree murder (Trial Tr. (Vol. III), p.101, L.18 – p.103, L.24), and received a life sentence, with 22 years fixed. (Trial Tr. (Vol. I), p.389, L.24 – p.390, L.1.) Mr. Herrera filed a timely Notice of Appeal. (R., p.286.)

ISSUE

1. Was the evidence of malice sufficient to support Mr. Herrera's second degree murder conviction when it is undisputed that Mr. Herrera believed the gun was unloaded at the time it discharged?

2. Did the district court err when, over Mr. Herrera's objection, it permitted the State to present irrelevant and prejudicial hearsay attributed to the victim?

3. Did the district court err when it denied Mr. Herrera's motions for mistrial after two of the State's final witnesses provided prejudicial testimony on matters that had been expressly excluded by the district court?

ARGUMENT

I.

The Evidence Of Malice Was Insufficient To Support Mr. Herrera's Second Degree Murder Conviction When It Is Undisputed That Mr. Herrera Believed The Gun Was Unloaded At The Time It Discharged

A. Introduction

At trial, the State presented evidence that Ms. Comack died as a result of a gunshot wound to the head from a gun fired by Mr. Herrera. Mr. Herrera's mother, Jerilyn Herrera, testified that she heard a single gunshot, ran upstairs, and saw Mr. Herrera waving a gun, shouting, "Oh, my God. I accidentally shot Stefanie," at which point he briefly put the gun to his own head before throwing it on the ground at Ms. Herrera's request. (Trial Tr. (Vol. I), p.203, L.10 – p.205, L.14.) Ms. Herrera then retrieved the gun, and set it on a window sill. (Trial Tr. (Vol. I), p.205, Ls.15-20.)

Robert Loe, a detective with the St. Maries Police Department who was the first to respond, testified, "As I was driving up, I could hear [Mr. Herrera] screaming. And as I pulled up towards the front of the house, [Mr. Herrera] saw me. He ran on the sidewalk and started screaming for me to help him because he accidentally shot his girlfriend." (Trial Tr. (Vol. I), p.140, L.6 – p.141, L.11.) Detective Loe characterized Mr. Herrera as being "totally hysterical." (Trial Tr. (Vol. I), p.145, Ls.2-4.) When Detective Loe recovered the gun from the window sill where Ms. Herrera had placed it, he tucked it into his shirt. (Trial Tr. (Vol. I), p.147, Ls.11-18.) The magazine for the gun was located near where Ms. Comack's legs had been, and had dried blood spatter on it, indicating that it was not in the gun when the fatal shot was fired. (Trial Tr. (Vol. I), p.148, L.25 – p.149, L.6, p.249, Ls.15-18.)

Stuart Jacobson, a forensic scientist with the Idaho State Police, examined the gun involved in Ms. Comack's death, and discovered that, half of the time he test fired it, the last round in the chamber did not eject when the slide was pulled back. (Trial Tr. (Vol. I), p.270, L.21 – p.272, L.25.) Detective Berger, in testimony elicited by the State, described the significance of such a malfunction:

> Q. If someone – and some members of the jury may understand this, but some may not. So bear with me. If you take a semiautomatic handgun and it's loaded in the chamber and you – and you take out the clip, you push the – you extract the clip, and then you pull the receiver back and it fails to extract, what is the result of that?
>
> A. If it fails to extract, the bullet's still in the barrel, in the chamber of the gun.
>
> Q. So even though there's no clip in it, it's still got a live round in the gun; is that right?
>
> A. It will still have a live round in the gun, yes.
>
> Q. If you have an empty semiautomatic – and this may seem odd – and you – empty in the chamber and you have a full magazine and you drop the clip first and you work the slide, what is the result?
>
> A. If there's nothing in the chamber, there won't be any bullets in the chamber if you drop the clip and then work the slide.

(Trial Tr. (Vol. I), p.305, Ls.4-23 (bold type removed).)

Throughout the State's closing argument and rebuttal closing, as will be discussed in greater detail below, the State repeatedly conceded and argued that Mr. Herrera did not believe the gun was loaded at the time he pulled the trigger. (Trial Tr. (Vol.. III), p.39, Ls.20-22, p.40, Ls.19-20 ("He pulled the trigger. He just thought the gun was empty."); p.97, Ls.15-19 ("He pulled that gun out, he put it to her head. *He thought he took the bullets out.* He pulled the trigger and the bullet came out. That's murder in the second degree.") (emphasis added).) In light of the case law, detailed below, the undisputed facts of this case, and the State's judicial admissions that

Mr. Herrera did not believe the gun was loaded at the time it discharged, the evidence of malice was insufficient to support a verdict of guilty of second degree murder.

B. Standard Of Review

The standard of review for an appellate court regarding the sufficiency of the evidence to sustain a conviction was ably set forth by the Idaho Court of Appeals in *State v. Peite*, 122 Idaho 809, 823 (Ct. App. 1992), in which it noted,

> A conviction will not be set aside where there is substantial evidence upon which any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. On appeal, we construe all facts, and inferences to be drawn from those facts, in favor of upholding the jury's verdict. Where there is competent although conflicting evidence to sustain the verdict, we will not reweigh the evidence or disturb the verdict.

Id. (citations omitted). "For evidence to be substantial, it must be of sufficient quality that reasonable minds could reach the same conclusion." *State v. Johnson*, 131 Idaho 808, 809 (Ct. App. 1998) (citing *Bott v. Idaho State Bldg. Auth.*, 128 Idaho 580, 586 (1996)).

C. The Evidence Of Malice Was Insufficient To Support Mr. Herrera's Second Degree Murder Conviction When It Is Undisputed That Mr. Herrera Believed The Gun Was Unloaded At The Time It Discharged

Idaho Code § 18-4001, in relevant part, provides, "Murder is the unlawful killing of a human being . . . with malice aforethought . . . which results in the death of a human being." I.C. § 18-4001. Idaho Code § 18-4002 provides, "Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing shows an abandoned and malignant heart." I.C. § 18-4002. "[T]o support a second degree

murder conviction, there must be in the record evidence of an unlawful killing and of malice aforethought." *State v. Ziegler*, 107 Idaho 1133, 1136 (Ct. App. 1985).

Idaho Code § 18-4006, in relevant part, provides, "Manslaughter is the unlawful killing of a human being . . . without malice. It is of three (3) kinds," one of which is involuntary manslaughter, which arises, *inter alia*, in "the operation of any firearm or deadly weapon in a reckless, careless or negligent manner which produces death." I.C. § 18-4006.

At the outset, it is worth noting that the State expressly disavowed any claim that Mr. Herrera acted with express malice when it argued,

> And what the law in this says is there's actually two kinds of malice: Express or implied malice. Either one suffices. The first is expressed [sic] malice means the intent to unlawfully kill someone. In other words, *that would be present if Mr. Herrera knew there was a bullet in the handgun, pointed it at anybody and pulled the trigger.* That would be at least expressed malice, if not premeditation. And – but express malice at the very minimum. So express malice is only peripherally involved in this case, I'll discuss that in a minute.[2]
>
> But the real issue in this case is implied malice. *Implied malice is a little more complex. Implied malice you'll recall requires that you do something on purpose. Now this is very important. Doesn't mean that he shot Stefanie on purpose.* It means that he did the things which caused her to get shot on purpose.
>
> In other words, if you find that he pointed the gun at her on purpose, that's the malice you need to find. You don't need to find that he actually shot her on purpose. For example, if he thought the gun was unloaded but nonetheless he pointed the gun at her on purpose and pulled the trigger, that is malice. That is malice implied in the law and that's murder in the second degree.
>
> And that's the real issue in this case. Did he point that gun at her on purpose or did he handle it in some deadly manner on purpose, even if he didn't actually point it at her. Even if he engaged in it in some malicious or

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[2] Several pages later, the State explained why an intentional, first degree murder charge made no sense under the facts of the case, concluding that such a charge "doesn't hold water" and "is not supported by the evidence." (Closing Argument Tr., p.46, Ls.2-22.)

> deadly manner, then malice is present. Implied malice. If she gets killed by him pulling a stunt like that, that's murder in the second degree.

(Trial Tr. (Vol. III), p.21, L.17 – p.22, L.23 (emphases added).)

Later, in explaining the possible scenarios under which Ms. Comack could have died, the State contended that only two were "logical," each of which involved Mr. Herrera sincerely believing that the gun was not loaded at the time that it fired. (Trial Tr. (Vol. III), p.39, Ls.20-22, p.50, Ls.19-20 ("He pulled the trigger. He just thought the gun was empty.").) In the first such scenario, labeled "[S]cenario No. 3," Mr. Herrera mistakenly believed he had ejected the remaining cartridge after removing the magazine and before pointing the gun at Ms. Comack.[3] (Trial Tr. (Vol. III), p.39, L.22 – p.41, L.17.)

The State described "Scenario No. 4" as being "similar, but slightly different" from Scenario No. 3. (Trial Tr. (Vol. III), p.41, Ls.18-19.) It presented that scenario as follows:

> So when he takes his gun out, inexperienced, unskillful with it. Stoned. He just smoked marijuana. Used meth the night before. Hasn't slept. Tired. Aggravated. She's leaving. He gets it backwards. Instead of dropping the clip and flipping the receiver, he flips the receiver and drops the clip. That's scenario No. 4.
>
> Now, why does that make sense? Because we know a round winds up in the chamber because it killed Stefanie Comack. We know that. It's a fact. We also know the magazine winds up on the floor between her feet. We know that fact.
>
> He told us that he flipped the receiver and it went off. We know he picked up the gun. He said he operated it. So if he gets that order backwards and he goes up and flips the receiver and drops the clip, and he simply has the order backwards, the scenario you have now is this.

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[3] This theory is particularly plausible, given the testimony of the State's expert concerning the firearm's tendency to malfunction when he attempted to eject the final cartridge. (Trial Tr. (Vol. I), p.270, L.21 – p.272, L.25.)

> The magazine was in the gun. It had bullets in it. The gun was empty. He flips the receiver out of order and what does it do, it feeds a round into the chamber. It's ready to fire. Then he drops the clip and he puts it to her head – failure [sic] to realize he just got the order backyards [sic] – and pulls the trigger and shoots her in the head. And then says, "Oh my God, I didn't mean to." Maybe he didn't. But it's malicious. It is malicious.

(Trial Tr. (Vol. III), p.42, L.18 – p.43, L.19.)

The State then argued that, under either of the only two scenarios it endorsed, Mr. Herrera acted with malice, and "[t]he fact that he fouled up is no different than the gangster shooting upstairs in a house. 'I didn't know anybody was up there. I didn't mean to.' You didn't mean to, but it was malicious. And that's murder in the second degree." (Trial Tr. (Vol. III), p.43, L.22 – p.44, L.2.) The State went on to argue,

> [I]t doesn't matter which one you pick, malice is present. But it's probably 3 or 4. Beyond a reasonable doubt is 3 or 4, or some similar scenario where he gets this gun, no magazine in it, and puts it against her head and pulls the trigger. Maliciously.
>
> First degree murder doesn't fit. The innocent handling of the gun doesn't fit.

(Trial Tr. (Vol. III), p.48, Ls.13-20.)

The State concluded by reiterating that "[i]t doesn't matter if he didn't think there was a round in the gun," before bizarrely (and incorrectly) arguing,

> Doesn't matter if he was thinking he was going to commit suicide by himself. That's malicious, by the way. Think about that. You want someone else to do something, so you make a terroristic threat against yourself with a deadly weapon. That's malice in itself. That's not innocent. That is malicious.
>
> Regardless of any other – once he acted maliciously whether against himself or Stefanie Comack and caused her death by that behavior, that's murder in the second degree.

(Trial Tr. (Vol. III), p.51, Ls.10-21.)[4]

[4] The State appears to have been advancing some sort of transferred malice theory under which a person who attempts to commit suicide but ends up accidentally killing

In its rebuttal closing argument, the State maintained its stance that Mr. Herrera did not think the gun was loaded at the time it discharged, concluding its argument by stating, "He pulled that gun out, he put it to her head. *He thought he took the bullets out.* He pulled the trigger and the bullet came out. That's murder in the second degree." (Trial Tr. (Vol. III), p.97, Ls.15-19 (emphasis added).)

In short, the State's position below was that Mr. Herrera sincerely believed that the gun was unloaded at the time he pointed it at Mr. Comack and pulled the trigger. It then argued that his sincere belief regarding the state of the gun was irrelevant in considering whether he acted maliciously, asserting that all that was necessary to prove the implied malice necessary to support a guilty verdict for second degree murder was that he pulled the trigger of a gun he believed to be unloaded because doing so was dangerous and malicious. The key problem with this argument is that it renders Idaho Code § 18-4006's provision for involuntary manslaughter a nullity. *See Hecla Mining Co. v. Idaho State Tax Com'n*, 108 Idaho 147, 151 (1985) ("[I]t is incumbent upon a court to give a statute an interpretation that will not render it a nullity.") (citation omitted).

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someone else has the malice against himself converted into malice against the person who died accidentally during the attempt. Such a proposition is both legally and logically untenable. *See State v. Nastoff*, 124 Idaho 667, 670 (Ct. App. 1993) ("[W]hat has sometimes been referred to as 'transferred intent' is applicable only within the limits of the same crime; A's intent to kill B may suffice as to his causing the death of C, but A's intent to steal from C will not suffice as to his causing the burning of C's property. That is, while a defendant can be convicted when he both has the *mens rea* and commits the *actus reus* required for a given offense, he cannot be convicted if the *mens rea* relates to one crime and the *actus reus* to another.") (brackets in original) (quoting 1 LaFave and Scott, SUBSTANTIVE CRIMINAL LAW, § 3.11 at 385 (1986) (footnote omitted)). Furthermore, attempted suicide does not appear to be a crime in Idaho. *See* I.C. § 18-4017 (making it a crime for any person to *assist* another person in committing, or attempting to commit, suicide); Robert E. Litman, M.D., *Medical-Legal Aspects of Suicide*, 6 WASHBURN L.J. 395 (1967) ("According to written reports from the Attorney General of each of the states (in 1964), there are only nine states – Alabama, Kentucky, New Jersey, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Washington – in which suicide is a crime.").

Furthermore, a similar argument, relating to battery, has been rejected by the Idaho Court of Appeals. *See State v. Billings*, 137 Idaho 827 (Ct. App. 2002).

In *Billings*, the defendant challenged the sufficiency of the evidence supporting his conviction for aggravated battery resulting from firing a shotgun at the ground near another person, causing the person to be struck by ricocheting pellets. *Billings*, 137 Idaho at 828. In response to the defendant's sufficiency argument, the State argued,

> [T]he only intent [it] was required to prove was that Billings intended to fire the shotgun. According to the State, Billings may be convicted of aggravated battery even absent any intent to cause a physical contact with [the victim]'s body. Because it was uncontroverted that Billings intended to fire the shotgun, the State argues, the burden of proof on the mental element of the offense was clearly satisfied.

Id. at 829. In rejecting the State's argument, the Court of Appeals explained, "[T]he State was required to prove that Billings intended to cause the shotgun pellets to strike [the victim]. The State's argument that the prosecutor needed to prove only that Billings intended to pull the trigger on the shotgun is meritless." *Id.* at 830. The State's argument in this case can be seen as mirroring that which was rejected in *Billings* because, in both, the State has sought to eliminate or grossly limit the mental state required to support a conviction for the underlying offense.

The Idaho Supreme Court has recognized "that where a homicide is committed by the unlawful use of a deadly weapon *in a way to indicate an intention to kill* (i.e., used in a deadly and dangerous manner), the law presume[s] malice." *State v. Gomez*, 94 Idaho 323, 325 (1971) (citations omitted) (emphasis added). In rejecting an argument that the evidence of malice was insufficient to support a second degree murder conviction, the Idaho Court of Appeals applied this presumption, reasoning,

> [A] number of eyewitnesses testified that Jaco used a deadly weapon against both Quezada and Jose Luis Flores in a deadly manner. According to this evidence, Jaco not only fired a warning shot into the air

> without regard to where the bullet would stray, but also aimed his gun at both Jose Luis and Quezada and pulled the trigger, *knowing that some of the chambers were loaded*. Such use of a deadly weapon against at least two people, one of whom is shot and killed in this manner, is sufficient to satisfy the malice element necessary to sustain Jaco's second degree murder conviction.

State v. Jaco, 130 Idaho 870, 876 (Ct. App. 1997) (citation omitted) (emphasis added). The facts of Mr. Herrera's case are the opposite of those presented in *Jaco*, in that it is undisputed that Mr. Herrera believed the gun to be unloaded, whereas Mr. Jaco acted "knowing that some of the chambers were loaded." Furthermore, as discussed below, case law and authority involving deaths resulting from the firing of "unloaded" firearms uniformly supports Mr. Herrera's contention that the evidence is insufficient to support a second degree murder conviction.

According to 40 American Jurisprudence 2d Homicide § 90,

> Where a person points a pistol at another in sport, as a joke, or merely to cause fright, believing and perhaps having some reason to think that it is not loaded, and subsequently pulls the trigger, causing the pistol to be discharged, and resulting in the killing of the person pointed at, he or she is guilty of manslaughter.

40 AM. JUR. 2D *Homicide* § 90 (2008) (footnote omitted). A similar conclusion appears in another treatise: "[M]anslaughter is committed where a defendant points a gun, which he believes to be unloaded, at another person, as a joke or merely to cause fright, and pulls the trigger causing the gun to be discharged, resulting in such other person's death . . . ." 2 Wharton's Criminal Law § 171 (15th ed. 1994) (footnotes omitted).

In *Allstate Ins. Co. v. McCarn*, 683 N.W.2d 656 (Mich. 2004), the Michigan Supreme Court considered whether an insured's grandson's act in pointing what he believed was an unloaded gun at a friend's head and intentionally pulling the trigger, resulting in the friend's death, was covered by the grandparents' homeowner's insurance policy. *Allstate Ins. Co.*, 683 N.W.2d at 658-59. Interpreting the language of

the policy required the application of a two prong test under which "[t]here is no insurance coverage if, first, the insured acted either intentionally or criminally, *and* second, the resulting injuries were the reasonably expected result of an insured's intentional or criminal act." *Id.* at 660 (emphasis added). The court explained that, assessing the second prong, "requires this Court to engage in an objective inquiry. That is, we are to determine whether a reasonable person, possessed of the totality of the facts possessed by [the shooter], would have expected the resulting injury." *Id.* (citation omitted).

The court noted that Allstate had never disputed the insured's contention that the shooter believed the gun to be unloaded at the time he pulled the trigger, and explained "we are called on to determine if a reasonable person would have expected bodily harm to result when the gun, in the unloaded state [the shooter] believed it to be, was 'fired.'" *Id.* Providing its answer, the court responded, "The answer is no because, obviously, an unloaded gun will not fire a shot," and concluding that summary judgment in favor of the insured being covered for the incident, explained, "reasonable minds could not differ that an unloaded gun will not fire a shot . . . ." *Id.*

A number of other courts have reached the conclusion that a person who intentionally points a firearm at another person and, believing it to be unloaded, pulls the trigger, resulting in the person's death is not guilty of murder. *See Tait v. State*, 669 So.2d 85 (Miss. 1996) (evidence that, while joking around and engaging in horseplay, defendant pointed a gun at his friend's head and pulled the trigger, with no evidence that he knew the gun was loaded, was insufficient to support murder conviction but was sufficient to support manslaughter conviction); *State v. Sexton*, 733 A.2d 1125, 1131 (N.J. 1999) ("[O]ne who discharges a gun, believing it to be unloaded, is not necessarily

innocent of manslaughter.") (citation omitted); *W.L.H. v. State*, 702 So.2d 1347 (Fla. Dist. Ct. App. 1997) ("The issue in this case is whether the act of intentionally pointing an automatic pistol at another person and pulling the trigger, resulting in the victim's death, constitutes the crime of manslaughter, even though the perpetrator believed the pistol to be unloaded and did not intend to inflict physical harm. We believe the answer is *yes* based upon precedent from this and other courts.") (emphasis in original) (citations omitted); *McCray v. State*, 140 S.W. 442, 443 (Tex. Crim. App. 1911) ("Had he pointed the gun at the deceased and pulled the trigger, believing the gun was unloaded, there might be a question of negligent homicide . . ."); Annotation, *Homicide by Wanton or Reckless Use of Firearm Without Express Intent to Inflict Injury*, 5 A.L.R. 603 (1920) ("In Reg. v. Campbell (1869) 11 Cox, C.C. (Eng.) 323, it appeared that the accused had killed another by leveling and firing a gun at him. The question before the jury was whether the accused knew at the time that the gun was loaded. The court instructed as follows: 'If he fired it at the deceased, or anyone, knowing it to be loaded, the intent is to be presumed, and from the intention to kill the malice aforethought is implied in law. If you are satisfied the prisoner did not know the gun was loaded, then he cannot be convicted of murder, and the question will be one of manslaughter. As to that, I direct you that if a man take a gun, not knowing whether it is loaded or unloaded and using no means to ascertain, and fires it in the direction of any other person, and death ensures, he is guilty of manslaughter.'").

The State's insistence that Mr. Herrera believed the gun to be unloaded at the time that he purportedly aimed it at Ms. Comack and pulled the trigger constituted a judicial admission that precluded the jury from finding that Mr. Herrera believed the gun was loaded at the time it discharged. "It is settled law in this state that a formal

admission made by an attorney at trial is binding on his client as a solemn judicial admission." *McLean v. City of Spirit Lake*, 91 Idaho 779, 783 (1967) (citation omitted). "Generally judicial admissions remove the admitted facts from the field of controversy." *Strouse v. K-Tek, Inc.*, 129 Idaho 616, 618-19 (Ct. App. 1997) (citations omitted). Judicial admissions can be made during closing argument in a criminal case. *See United States v. Bentson*, 947 F.2d 1353, 1356 (9th Cir. 1991) (finding the existence of a binding judicial admission that foreclosed a sufficiency argument with respect to an element of the offense when, in closing argument, defense counsel "stated in open court that he [the defendant] was not claiming that he filed valid tax returns"). "The main characteristic of a judicial admission is the conclusive effect upon the party making the admission." *Kohne v. Yost*, 818 P.2d 360, 362 (Mont. 1991).

In this case, the State's entire case was centered around two theories – each of which relied on the existence of a factual scenario in which Mr. Herrera honestly believed the gun was not loaded when it discharged, resulting in Ms. Comack's death. As acknowledged by the State, no evidence in the record supports a contrary conclusion.[5] Furthermore, even assuming such evidence existed in the record, the State's judicial admissions that Mr. Herrera honestly believed the gun to be unloaded foreclosed the possibility of a jury verdict based on such a finding. As such, the evidence was insufficient to support the jury's guilty verdict on the charge of second degree murder.

[5] All of the other evidence compels a finding that Mr. Herrera believed the gun to be unloaded, namely, his reaction to the incident, the fact that the magazine was not in the gun when it discharged, and the tendency of the gun to malfunction when an attempt was made to eject the final cartridge.

The evidence presented was sufficient to support only a conviction for involuntary manslaughter, as it was undisputed that Mr. Herrera's behavior with respect to what he believed was an unloaded firearm involved the "operation of a[] firearm . . . in a reckless, careless or negligent manner which produce[d] death." I.C. § 18-4006.[6] The appropriate remedy is to vacate the judgment of conviction for second degree murder, and remand this matter for entry of a judgment of acquittal on that charge with entry of a judgment of conviction for involuntary manslaughter or for a new trial.[7]

II.

The District Court Erred When, Over Mr. Herrera's Objection, It Permitted The State To Present Irrelevant And Prejudicial Hearsay Attributed To The Victim[8]

A. Introduction

The district court permitted the State to present, under the state of mind exception to the hearsay rule contained in Idaho Rule of Evidence 803(3), inadmissible, irrelevant, and prejudicial hearsay attributed to Ms. Comack, consisting almost entirely of prior bad acts and statements attributed to Mr. Herrera. Specifically, witnesses were permitted to testify that Mr. Herrera had threatened to commit suicide if Ms. Comack

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[6] Just as the State conceded that Mr. Herrera believed the gun was unloaded, defense counsel conceded that Mr. Herrera was guilty of involuntary manslaughter. (Trial Tr. (Vol. III), p.84, Ls.13-16 ("And when you go into that room you do justice and you find Joe not guilty of second degree murder and not guilty of voluntary manslaughter but guilty of involuntary manslaughter.").

[7] Although Mr. Herrera maintains that the evidence was insufficient to support a guilty verdict for voluntary manslaughter, he recognizes that the issue was not decided by the jury. Therefore, if he prevails on his sufficiency claim, it will be up to the State to decide whether to accept his concession of guilt as to involuntary manslaughter or attempt to retry him for voluntary manslaughter and the lesser-included offense of involuntary manslaughter.

[8] Mr. Herrera urges this Court to review this issue even after finding the evidence insufficient to support a second degree murder conviction, as the district court will need guidance on this issue at any retrial.

broke off their relationship, struck her head against a gear shifter before pointing a gun at her head and threatening to shoot her, and broke at least one cellular phone belonging to Ms. Comack. Additionally, an exhibit, consisting of an exchange of Facebook messages between Ms. Comack and her sister in which both express negative feelings concerning Mr. Herrera and in which statements attributed to Mr. Herrera regarding Ms. Comack's appearance were recounted, was admitted. All of the disputed evidence was inadmissible hearsay, and was both irrelevant and prejudicial. Given the inflammatory and prejudicial nature of the evidence, along with the weak nature of the State's case for second degree murder, its admission cannot be said to have been harmless beyond a reasonable doubt.

B. The District Court Erred When, Over Mr. Herrera's Objection, It Permitted The State To Present Irrelevant And Prejudicial Hearsay Attributed To The Victim

At trial, four witnesses provided objected-to testimony or evidence concerning hearsay statements attributed to Ms. Comack. Kaytlin Comack[9] provided foundation for a series of Facebook messages purportedly exchanged between Kaitlyn and Ms. Comack the day before Ms. Comack's death. (Trial Tr. (Vol. I), p.327, L.3 – p.328, L.18.) As a result of her testimony, and over Mr. Herrera's objection (Trial Tr. (Vol. I), p.325, Ls.22-25), State's Exhibit No. 12, a series of Facebook messages between Kaitlyn and Ms. Comack, was admitted. (Trial Tr. (Vol. I), p.328, Ls.19-22.) State's Exhibit No. 12 set forth the following exchange:

> **Stefanie Comack**
> Kayt, i [sic] feel like a shitty sister. I'm sorry about all those things i [sic] said to you when you were having Trenton. I should have been there. I couldn't get D.J. or Trenton anything for Christmas and i [sic] feel like shit about it. I couldn't get anyone anything.

[9] To avoid confusion, Kaytlin Comack will be referred to as "Kaytlin" throughout the remainder of this brief.

Kaytlin Comack
I'm on moms [sic] phone and it will only let me read the first line but just so you know I love you and I'm sorry too I just wanted u at the hospital and I want you back as my sister I miss you sooo [sic] much and joes [sic] an ass bugs YOUR [sic] SO BEAUTIFUL don't let him bring you down

Stefanie Comack
[Blank Message]

Stefanie Comack
Thanks but it's ok i [sic] know i'm [sic] not pretty and it doesn't bother me anymore. Please don't tell any1 [sic] it does embarras [sic] me th [sic] At [sic] even my boyfriend thinks that. I'm starting to realize he doesn't care. Y are people so mean. I hate myself so much i [sic] Don [sic] get out of bed 4hrs [sic] after i [sic] wake up. Plz [sic] dont [sic] tell any1 [sic] anythin [sic] ive [sic] said 2 u. Itl [sic] just embarras [sic] me. Im starting to Realize he really doesn't care. I thought i'd [sic] be alot [sic] more sad about it but i [sic] think i [sic] might hate him to [sic] much to be sad.

Kaytlin Comack
hes [sic] a loser dude and you dont [sic] need to listen to him you really are pretty. when [sic] are you coming down here were [sic] all already here do you want to come stay the night tonight ? itll [sic] be just me u dj n trenton. dont [sic] hate yourself you have way to [sic] much going for ;you [sic] I love you bug

Kaytlin Comack
and [sic] you have to quit with he [sic] throwing up because you are getting waaay [sic] skinny and youve [sic] always been perfect bugs. we [sic] miss you and joes [sic] just mean if hes [sic] going to treat you the way he does he doesnt [sic] deserve you everyone agrees i [sic] know it seems like were [sic] always on your shit but its [sic] just because were [sic] all worried about you and love you

(State's Exhibit No. 12 (bold type in original) (e-mail header excluded).)

Eunice McEwen then testified, over Mr. Herrera's objection (Trial Tr. (Vol. I), p.331, Ls.10-19), that approximately one week before Ms. Comack's death, Ms. Comack told her "that her and Joe got in a fight and he hit her head against the shifter and choked her and put a gun to her head and said that, if she didn't shut up, that he was going to shoot her." (Trial Tr. (Vol. I), p.331, L.21 – p.332, L.1.) Ms. McEwen didn't know when the incident had occurred, but explained, "She said that

she broke up with him and that he yelled at her before and stuff like that." (Trial Tr. (Vol. I), p.332, Ls.4-7.)

Bobbie Jo Riddle then testified, over Mr. Herrera's objection (Trial Tr. (Vol. II), p.15, L.1 – p.16, L.6), that Ms. Comack had told her that Mr. Herrera had mistreated her during their relationship, and that Ms. Comack was having trouble breaking up with Mr. Herrera because, every time she tried to do so, he threatened to kill himself. (Trial Tr. (Vol. II), p.16, L.15 – p.19, L.16.)

Susie Comack,[10] Ms. Comack's mother, then testified that, approximately two weeks before Ms. Comack's death, Ms. Comack told Susie that Mr. Herrera had broken her phone because she was going to call Susie for a ride home. (Trial Tr. (Vol. II), p.64, Ls.3-8.) Susie further testified that, in the weeks before her death, Ms. Comack asked to use Susie's car to visit Mr. Herrera because he had threatened to kill himself. (Trial Tr. (Vol. II), p.65, Ls.4-8.) The day before Ms. Comack's death, Susie told "her that this was no way to live, that she did not need to live like this," to which Ms. Comack purportedly responded, "Mom, you don't understand. He's psycho." (Trial Tr. (Vol. II), p.66, Ls.14-21.)

Idaho Rule of Evidence 803, in relevant part, provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness.
>
> . . .
>
> (3) **Then existing mental, emotional, or physical condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it

[10] To avoid confusion, Susie Comack will be referred to as "Susie" for the remainder of this brief.

> relates to the execution, revocation, identification, or terms of declarant's will.

I.R.E. 803 (bold type in original). "The rationale for the Rule 803(3) hearsay exception is that the element of contemporaneity provides some assurance against fabrication." *Herrick v. Leuzinger*, 127 Idaho 293, 301 (Ct. App. 1995) (citation omitted).

"Limited circumstances exist in which statements made by a murder victim to a third party are admissible under I.R.E. 803(3)'s state of mind exception to the hearsay rule." *State v. Shackelford*, 150 Idaho 355, 364 (2010) (citation omitted). Such "statements may be admitted only after a determination that (1) the declaration is relevant, and (2) the need for and value of such testimony outweighs the possibility of prejudice to the defendant." *Id.* (citation omitted).

The Court, in *Shackelford*, noted that it had previously "recognized four well-defined categories in which a declarant-victim's state of mind is relevant because of its relationship to the legal theories presented by the parties," including "when the defendant claims the killing was accidental . . . ." *Shackelford*, 150 Idaho at 364-65 (citing *State v. Goodrich*, 97 Idaho 472, 477 n.7 (1976)).[11] In *Goodrich*, the Court explained, "Other states have found that a statement of fear of the defendant, made by the deceased-victim to a third party, is relevant in a homicide case . . . when the defendant claims the killing was accidental." *Goodrich*, 97 Idaho at 477 n.7 (citing *People v. Lew*, 441 P.2d 942 (Cal. 1968)). Because *Lew* was the only case cited for the accidental death proposition by the Court, a detailed analysis of that opinion is necessary.

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[11] The Court explained that its reliance on cases predating the adoption of the evidence code was appropriate because "the 'state of mind' exception existed under common law rules of evidence used in Idaho in nearly identical from to I.R.E. 803(3); thus, the analysis remains similar." *Shackelford*, 150 Idaho at 364 n.3 (citation omitted).

In *Lew*, the California Supreme Court was confronted with facts similar to the facts of Mr. Herrera's case. Lew was convicted of second degree murder after a trial at which hearsay statements of the victim, Karen Gervasi, were admitted to show her state of mind at the time of her death. *Lew*, 441 P.2d at 942. Lew was engaged in an extramarital affair with Karen, and according to Lew, the two went to his home to retrieve a gun so that Karen could try firing it at a range. *Id.* While at the apartment, they sat down next to each other on a couch, and he removed the magazine from the gun, dropping it on the floor, before handing it to Karen. *Id.* at 943. As he bent over to pick up the magazine, he heard a shot. *Id.* Upon discovering that Karen had been shot in the head, he became hysterical, sought emergency help, and when the police arrived, he was in front of the apartment "motioning for them to hurry." *Id.* Karen, still alive but bleeding profusely from her head, died shortly after arriving at the hospital without being able to recount the details surrounding her injury. *Id.*

At trial, the State was permitted to offer hearsay statements of Karen, over Lew's objection, purportedly made to five of Karen's friends. *Id.* The court summarized the contested testimony as follows:

> Five witnesses (Professor Resch, Dale Moore, Diane Ijames, Patricia Mullen, and Leslie Sautter) testified that Karen told them defendant had threatened to kill her. Professor Resch and Dale Moore declared that Karen also told them defendant had threatened to harm her parents if she confided in them. Leslie Sautter testified that Karen said defendant had threatened to throw the rings he presented to her into the ocean if she would not accept them. Diane Ijames declared that Karen said defendant had told her he had purchased adjoining cemetery plots for her and for him. Professor Resch and Diane Ijames also testified that Karen said defendant had displayed a gun when she, defendant's wife, and defendant met in a parking lot. Dale Moore stated that Karen requested him to witness two parking lot meetings she had with defendant because she feared him. Professor Resch and Leslie Sautter further testified that Karen told them defendant often went into rages, had a terrible temper, and she feared him.

Id. at 943.

The court broke these statements into two categories, with the "first four . . . threats allegedly made by defendant to Karen which she then related to friends," while "the last three consist of Karen's remarks to friends which no more than purport to reflect her attitude toward defendant." *Id.* at 943-44. The court explained that the first category of statements – the threats by Lew – "constitute[d] hearsay on hearsay" and thus could not be introduced as admissions of the defendant. *Id.* at 944. The court then considered the State's argument that the statements were nonetheless admissible to show Karen's state of mind. *Id.* In rejecting Lew's contention that Karen's "state of mind is not in issue where the defense is accidental shooting so long as the defense does not argue that the shooting arose accidentally out of a struggle instigated by the victim," the court explained that "some probative value attached to Karen's expressed fear of defendant because it enables the factfinder to infer that Karen might have been reluctant to handle a gun in defendant's presence." *Id.* at 945 (footnote omitted).

Despite finding that the threats had some probative value and were therefore relevant, the court concluded that the statements should have been excluded because they failed to meet the "exacting standards" necessary to satisfy the exception. *Id.* The court explained, "An initial requirement is 'that such testimony is not admissible if it refers solely to alleged past conduct on the part of the accused. This is so because to try and separate state of mind from the truth of the charges is an almost impossible task.'" *Id.* (citation omitted).[12] In concluding that these statements did not satisfy the initial requirement, the court explained, "Most of the statements made by Karen refer to

[12] The second, "equally important," requirement "is that there must be 'at least circumstantial evidence that (the statements) are probably trustworthy and credible.'" *Id.* (citation omitted).

past conduct of defendant: the drawing of the gun in the parking lot, his temper tantrums, the purchase of adjoining cemetery lots, [and] his previous threats to kill her." *Id.*

The California Supreme Court's finding that a crime victim's statements concerning past events involving the defendant are generally not admissible under the state of mind hearsay exception is not an unusual one. A number of appellate courts, including the United States Supreme Court, have reached the same conclusion. *See Shepard v. United States*, 290 U.S. 96, 105-06 (1933) ("Declarations of intention, casting light upon the future, have been sharply distinguished from declarations of memory, pointing backwards to the past. There would be an end, or nearly that, to the rule against hearsay if the distinction were ignored."); *State v. Abernathy*, 577 S.W.2d 591, 593 (Ark. 1979) ("For the most part [the victim's] quoted declarations are inadmissible as being statements of her memory about the past, not statements of an existing state of mind . . . Also inadmissible, as hearsay, were [the victim's] repetitions of what [the defendant] had said . . . .")[13]; *People v. Hackney*, 455 N.W.2d 358, n.2 (Mich. Ct. App. 1990) ("[A] statement explaining a past sequence of events (from the standpoint of the declarant at the time of the statement) is not a then existing physical condition within the meaning of the rule [Michigan Rule of Evidence 803(3)] but, rather, 'a statement of memory or belief' that is explicitly excluded from the exception.") (citations omitted); *State v. Hardy*, 451 S.E.2d 600, 612 (N.C. 1994) (murder victim's statements in her diary, which merely recited the facts of prior violent incidents involving

[13] The Idaho Supreme Court has relied upon case law from Arkansas when interpreting I.R.E. 803(3) as it applies to the decedent's state of mind with respect to a will. *See Montgomery v. Montgomery*, 147 Idaho 1, 9 (2009) (citing *Honey v. Hickey*, 760 S.W.2d 81 (Ark. Ct. App. 1988) and Arkansas Rule of Evidence 803(3)).

defendant, and did not include a recitation of her state of mind, such as an expression of fear, do not qualify as statements of the victim's state of mind under North Carolina Rule of Evidence 803(3)); *State v. Richardson*, 288 P.3d 995, 998 (Or. Ct. App. 2012) ("[T]he statements relate [the victim's] recollection of her intention in the past and her present conclusions, based on her reflection on the past, about a past event . . . [and] were not statements of her then existing state of mind but, instead, were statements of memory and belief."); *United States v. Lentz*, 282 F.Supp.2d 399, 412 (E.D. Va. 2002) ("In order for statements of prior abuse to qualify under the state of mind exception to the hearsay rule, the statements must show [the victim's] state of mind at the time period in question. [The victim's] statements of memory or belief about Defendant's abusive conduct that occurred in the past are an impermissible attempt to prove as true the fact remembered or believed. In general, a mere act of prior abuse itself cannot be admitted under the state of mind exception because [the victim] would be recalling past factual occurrences and not the state of her emotions at the time.") (citations omitted); *State v. Fulminante*, 975 P.2d 75, 88 (Ariz. 1999) (statement of murder victim recounting her memory of a past fact is "precluded by the last part of Rule 803(3)").

In *United States v. Cohen*, 631 F.2d 1223 (5th Cir. 1980), the Fifth Circuit interpreted Federal Rule of Evidence 803(3), explaining,

> [T]he state-of-mind exception does not permit the witness to relate any of the declarant's statements as to why he held the particular state of mind, or what he might have believed that would have induced the state of mind. If the reservation in the text of the rule is to have any effect, it must be understood to narrowly limit those admissible statements to declarations of condition – "I'm scared" – and not belief – "I'm scared because Galkin threatened me." Cohen's witnesses were permitted to relate any direct statements he had made concerning his state of mind but were prevented only from testifying as to his statements of belief – that he believed that Galkin was threatening him.

Cohen, 631 F.2d at 1225.

Each statement attributed to Ms. Comack and admitted over Mr. Herrera's objection included a recitation of Ms. Comack's memory of prior acts and her belief about those acts. As such, those portions of her statements were clearly inadmissible under Idaho Rule of Evidence 803(3). Additionally, only one of the statements attributed to Ms. Comack and admitted over Mr. Herrera's objection implicated Ms. Comack's state of mind at the time that she purportedly made it: the Facebook exchange, in which she explained that she thought she "might hate him to [sic] much to be sad." (State's Exhibit No. 12.) Whether Ms. Comack hated Mr. Herrera was of no relevance to whether her death was an accident. As such, even that lone statement of Ms. Comack's state of mind concerning her feelings about Mr. Herrera should not have been admitted.

Assuming that this Court finds the evidence supporting the second degree murder conviction sufficient, consideration of whether the error was harmless may be necessary. Considering the highly inflammatory and prejudicial nature of the irrelevant hearsay evidence, along with the weakness of the State's second degree murder case, it will be impossible for the State to persuade this Court that the error in admitting the evidence was harmless beyond a reasonable doubt. As such, this Court should vacate the judgment of conviction and remand this matter for a new trial.

III.

The District Court Erred When It Denied Mr. Herrera's Motions For Mistrial After Two Of The State's Final Witnesses Provided Prejudicial Testimony As To Matters That Had Been Expressly Excluded By The District Court

A. Introduction

On the third and fourth days of Mr. Herrera's four day trial, two of the State's final witnesses testified as to matters that the district court had explicitly prohibited from

being mentioned at trial. After each such instance, defense counsel moved, unsuccessfully, for a mistrial. Each instance involved testimony concerning prior bad acts attributed to Mr. Herrera, namely violent acts he purportedly committed against Ms. Comack. In light of its highly prejudicial nature and it occuring so late in the trial, the district court erred when it denied his motions for mistrial.

B. Standard Of Review

The Idaho Court of Appeals has explained the standard of review for the denial of a motion for mistrial as follows:

> [T]he question on appeal is not whether the trial judge reasonably exercised his discretion in light of circumstances existing when the mistrial motion was made. Rather, the question must be whether the event which precipitated the motion for mistrial represented reversible error when viewed in the context of the full record. Thus, where a motion for mistrial has been denied in a criminal case, the "abuse of discretion" standard is a misnomer. The standard, more accurately stated, is one of reversible error. Our focus is upon the continuing impact on the trial of the incident that triggered the mistrial motion. The trial judge's refusal to declare a mistrial will be disturbed only if that incident, viewed retrospectively, constituted reversible error.

State v. Urquhart, 105 Idaho 92, 95 (Ct. App. 1983).

C. The District Court Erred When It Denied Mr. Herrera's Motions For Mistrial After Two Of The State's Final Witnesses Provided Prejudicial Testimony As To Matters That Had Been Expressly Excluded By The District Court

Two of the State's final witnesses provided prejudicial testimony that the district court had previously excluded, leading Mr. Herrera to move for a mistrial twice. The first incident occurred during the following exchange between the prosecuting attorney and Kaytlin Comack:

> Q. And in the weeks leading up to Christmas day, did Stefanie tell you about her relationship with Joe?
>
> A. She did.

. . .

Q. . . . As far as those statements, give an idea of the time frame that you talked to Stefanie about this.

A. When we seen her, we had a Thanksgiving dinner. And she showed up, and she had handprint bruises.

Q. Sorry. About when was this?

A. It was Thanksgiving.

Q. It was what?

A. Thanksgiving was when she showed up with the handprints.

(Trial Tr. (Vol. I), p.311, L.13 – p.312, L.16 (bold type removed).)

Defense counsel immediately objected, and a hearing was held outside the presence of the jury. (Trial Tr. (Vol. I), p.312, Ls.17-25.) The district court immediately inquired of the State as to why information that it had specifically excluded was being offered, to which the State responded, "If I got a few minutes, I could try to let the witnesses know exactly what it is they're not to talk about. Frankly they don't understand the boundaries of that examination." (Trial Tr. (Vol. I), p.313, Ls.1-12.)

In moving for a mistrial, defense counsel argued,

I thought that was pretty clear, not only from your order where you specifically said nothing about bruising is going to be admitted, but even in chambers, when I was trying to limit or figure out what it was that [the prosecuting attorney] was going to ask of each witness so that there wouldn't be any of this.

And I think it's – I think the bell's been rung here. You know I wasn't really eager to jump up and go for a mistrial at that time we had the outburst by Mr. Comack [Ms. Comack's father]. At this point I don't know how you can unring this bell. She's testified that she showed up at Thanksgiving with, I think she said, finger mark shaped bruises and especially where it was specifically ordained by this Court that that wasn't going to be allowed. I think you can just look at the jury and see them gasp and grab the moment. So I don't know how you can unring that by telling them not to pay any attention to that when she's going to be allowed to testify to other things you've already ruled she could under 803(3).

(Trial Tr. (Vol. I), p.313, L.18 – p.314, L.12.)

In denying the motion for a mistrial, the district court reasoned,

> As far as the mistrial is concerned, I'm going to deny that because there was no linking or anything to the defendant. However, it seems to me that there is a point here, and that is, if testimony that I did rule was inadmissible [sic] comes in, the inference that the jury is going to draw is that that bruising did come from Mr. Herrera. And so while I'm going to deny the motion for a mistrial because I don't think it's – anything prejudicial has happened at this point, what I'm going to do is I'm going to make a ruling that Ms. [Kaytlin] Comack will not be allowed to testify to the other things.

(Trial Tr. (Vol. I), p.314, L.19 – p.315, L.5.) Upon the request of the State, the district court allowed Kaytlin to lay the foundation for the Facebook messages she exchanged with Ms. Comack prior to her death. (Trial Tr. (Vol. I), p.315, L.6 – p.329, L.2.)

Shortly thereafter, and on the final day of trial, a second State's witness provided testimony that had been excluded by the district court, leading to a second motion for mistrial. The exchange between that witness, Bobby Jo Riddle, and the prosecuting attorney occurred as follows:

> Q. Okay. Ms. Riddle, what – what caused this conversation about her relationship with Joe Herrera to come up, the conversation between you and Stefanie?
>
> A. How did it come up?
>
> Q. Right.
>
> A. She was leaving him.
>
> Q. She just started talking about him?
>
> A. Yes.
>
> Q. Okay. And what did she tell you about why she was leaving him?
>
> A. Well, she said that he sometimes got mean and she –
>
> Q. Let me ask you something specifically.

Did she talk about Joe having mistreated her in any way?

A. Yes.

Q. What did she say Joe had done to her?

A. He slapped her around, choked her.

(Trial Tr. (Vol. III), p.16, L.15 – p.17, L.7.) Defense counsel immediately asked to approach the bench, after which the district court instructed the jury to disregard Ms. Riddle's statements concerning slapping and choking. (Trial Tr. (Vol. III), p.17, Ls.8-23.)

Following a break in the proceedings, defense counsel placed on the record his renewed motion for a mistrial originally discussed during the sidebar that led to Ms. Riddle's testimony being stricken. (Trial Tr. (Vol. III), p.54, Ls.10-13.) Reviewing the prior testimony for which he moved for mistrial, as well as the impermissible testimony of Ms. Riddle, defense counsel explained,

> So we've got all these things that were clearly outside the scope of what the Court authorized following the motion in limine hearing, and I think that, you know, individually and cumulatively, they form too great a basis for us to be able to continue on without suffering from their effect.
>
> In other words, they're not harmless error, they're very substantial, and I think they actually go more towards 404(b) type evidence than anything else, notwithstanding the admonishments. Like I've said before, once you ring the bell, I don't think you can unring it, because the prosecution is clearly trying to show, as they claim, a state of mind relative to Ms. Comack, but by the same token, gets the benefit from a practical perspective of otherwise inadmissible 404(b) evidence coming in.

(Trial Tr. (Vol. III), p.56, L.18 – p.57, L.3.)

Denying the second motion for a mistrial, the district court reasoned,

> For each of the statements that the motion is made with respect to, the jury was previously instructed that any statements were admitted only for a limited purpose, to show the state of mind of the victim and not for the truth of the matter asserted. So let me begin with that premise that any testimony was already limited in its scope.

> The question about the bruise, that was not something that [the prosecuting attorney] asked about. The witness answered a completely different question than he asked, so that was certainly not any fault of his.
>
> And with respect to all of the incidents that you've mentioned, the jury was instructed to disregard testimony. I'm confident they can do so, particularly given the prior admonition that any such testimony as admitted only for a very limited purpose.
>
> So accordingly, the request is denied.

(Trial Tr. (Vol. III), p.57, Ls.4-20.)

In cases in which juries have been exposed to extraneous information or other improper influences, the Idaho Court of Appeals has followed an approach similar to the one adopted by the federal courts and declined to require a determination of actual prejudice. *Roll v. City of Middleton*, 115 Idaho 833, 837 (Ct. App. 1989). Such courts have generally held that if the trial judge finds that the extraneous information reasonably could have resulted in prejudice a new trial should be ordered. *Id.*

Consequently, the Idaho Court of Appeals has held that the proper standard is whether prejudice reasonably could have occurred, rather than whether prejudice actually has occurred. *Id.* The Court's holding relies on two considerations:

> First, the extreme rigor of an actual prejudice test would severely restrict the availability of relief for misconduct, thereby diminishing public confidence in the jury system and eroding the fundamental principle that a "verdict must be based upon the evidence developed at the trial." *United States v. Howard,* 506 F.2d 865, 867 (5th Cir.1975) (*quoting Irvin v. Dowd,* 366 U.S. 717, 722 (1961)). Second, Rule 606(b), I.R.E., precludes a full inquiry into actual prejudice. As mentioned above, Rule 606(b) bars jurors from giving evidence concerning their mental processes. Because jurors cannot be questioned as to whether they were in fact prejudiced by extraneous information, the trial judge must determine whether the information reasonably could have produced prejudice, when evaluated in light of all the events and the evidence at trial.

Id.

The Idaho Court of Appeals has explained the role that inadvertence and prompt curative instructions play in the determination of whether a mistrial should have been declared, explaining,

> Where improper testimony is inadvertently introduced into a trial and the trial court promptly instructs the jury to disregard such evidence, it is ordinarily presumed that the jury obeyed the court's instructions entirely. We normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an overwhelming probability that the jury will be unable to follow the court's instructions, and a strong likelihood that the effect of the evidence would be devastating to the defendant.

State v. Grantham, 146 Idaho 490, 498 (Ct. App. 2008) (citations omitted). "*Grantham* did not attempt to change the standard [set forth in *Urquhart*]; rather, it makes it clear that where a court gives a curative instruction, the appellate court may consider that factor in determining whether the error is reversible." *State v. Norton*, 151 Idaho 176, 193 (Ct. App. 2011). The strength of the case against the defendant plays an important role in assessing whether the introduction of improper testimony was harmless beyond a reasonable doubt. *See State v. Keyes*, 150 Idaho 543, 545 (Explaining that, "in a close case a corrective instruction, even one that is forceful, might be insufficient to cure the prejudicial effect of the improper" testimony, but concluding that such error was harmless beyond a reasonable doubt in light of "the overwhelming evidence" against the defendant).

The Idaho Court of Appeals has considered the limits on the effectiveness of such curative instructions, explaining,

> [A]lthough we normally presume that a jury will follow an instruction to disregard inadmissible evidence, this presumption cannot shield all errors from appellate review, regardless of the severity of the error or the forcefulness and effectiveness of the instruction. As the United States Supreme Court has recognized:

> [T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.
>
> *Bruton v. United States*, 391 U.S. 123, 135, 88 S.Ct. 1620, 1627, 20 L.Ed.2d 476, 485 (1968). We have similarly noted that where the evidence presents a close question for the jury, "a corrective instruction, even one that is forceful, might be insufficient to cure the prejudicial effect" of very damaging evidence. *State v. Keyes*, 150 Idaho 543, 545, 248 P.3d 1278, 1280 (Ct. App. 2011).

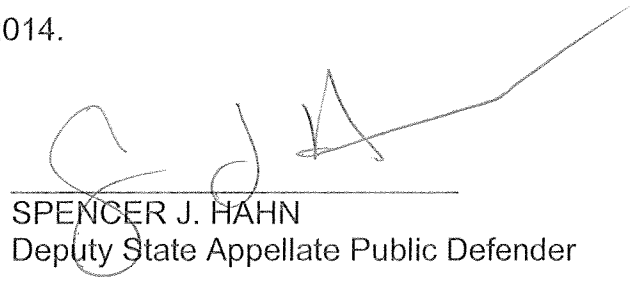
State v. Watkins, 152 Idaho 764, 768 (Ct. App. 2012).

Given the fact that two of the State's final witnesses provided testimony concerning domestic abuse purportedly committed by Mr. Herrera against Ms. Comack, the weakness of the State's second degree murder case (as outlined in section one), and in light of the nature of the charge for which Mr. Herrera was tried – a domestic violence murder – he asserts that, at the very least, the introduction of the extraneous information compels a finding that prejudice could reasonably have occurred. In short, Mr. Herrera asserts that there is no way for this Court to conclude that the introduction of excluded, highly prejudicial other acts evidence – even with curative instructions – was harmless beyond a reasonable doubt.

CONCLUSION

For the reasons set forth herein, Mr. Herrera respectfully requests that this Court vacate the judgment of conviction, and remand this matter for entry of a judgment of acquittal on the charge of murder in the second degree. He further requests that this Court declare the hearsay testimony admitted over his objection to be inadmissible at any retrial in this matter. In the alternative, he respectfully requests that this Court conclude that the district court's denial of his motions for mistrial resulted in reversible error, vacate his conviction, and remand this matter for a new trial.

DATED this 13th day of August, 2014.



SPENCER J. HAHN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 13th day of August, 2014, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

JOSEPH DUANE HERRERA
INMATE #108567
IMSI
PO BOX 51
BOISE ID 83701

FRED GIBLER
DISTRICT COURT JUDGE
E-MAILED BRIEF

JAMES E SIEBE
ATTORNEY AT LAW
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EVAN A. SMITH
Administrative Assistant

SJH/eas